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ABSTRACT

The scope of the American Presidency and the office's powers can change from one Chief Executive to the next. The Chief Executive is the Head of State, has Executive Powers and Privileges, is the Chief Negotiator in Treaties, the Commander-in-Chief of the Armed Forces, and leader of his political party. This paper considers European and U.S. influences on the creation of the Executive Branch of the United States government, particularly the contributions of John Locke, Montesquieu, and Sir William Blackstone. The paper discusses the political ideas of these European thinkers, and of the U.S. thinkers John Adams and Thomas Paine, and how they influenced the Constitutional Convention of 1787 in Philadelphia, Pennsylvania. It describes the executive proposals at the convention. On one side were those who favored an executive who would primarily be an agent of the legislature (their executive would be weak and composed of a group of officials acting as the legislature directed), while an opposite group saw the Chief Executive as a single person, chosen by some method other than by the legislature, with stronger powers vested in the office by the constitution. It notes that this second view would ensure separation of powers and place beyond the whims and dictates of legislative interferences. The paper explains that, as a result of deliberations, it was decided that a single executive acting energetically for the demands of the nation using forthright decisions, quickness of actions and secrecy, guarding the national interest, would be best. Includes 46 notes. (BT)

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The Evolution of the Executive During the Constitutional Convention of 1787.

Paul Wayne De Villier

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THE EVOLUTION OF THE EXECUTIVE DURING THE CONSTITUTIONAL CONVENTION OF 1787

By Paul Wayne De Villier, December 22, 2002

Over the past several decades, many Americans have become critics of what may be the most unique creation of the Constitutional Convention in 1787, that of the Executive, the American Presidency. Some of today's critics say that the powers of our Chief Executive are far too great and are unrestrained. Others believe that he is only a figurehead, a puppet at the head of the American Government whose strings are manipulated by stronger powers present in the government or economics spheres. We frequently hear of the tugs of war between the coordinate branches of the government regarding "Executive Privilege" and how it should be limited. Others question the President's power to wage war under the guise of "national security". The question then becomes "does that power belong to the President or to the Legislative Branch"? The scope of the American Presidency and the office's powers can change from one Chief Executive to the next. The range of powers that the President will exercise will depend on that person's position as a "loose or strict constructionist". Every organized group has a central figure as a leader or quasi-leader. Some have Chieftains, some have a Council of Elders, and others may have a Prime Minister, depending on their status as a group, provinces, or nation-state. In that leader may be vested only ceremonial duties as the Head of State or may in fact have real power as a President or Prime Minister. Only in the United States of America do we have a combination of all. Our Chief Executive is the Head of State, has Executive Powers and Privileges, the Chief Negotiator in Treaties, the Commander-in-Chief of the Armed Forces and is leader of his political party.

European and American Influences on the creation of the Executive

A reasonable place to begin is with European influences and the European political thought of the seventeenth and eighteenth centuries. It was in Europe that a number of the delegates, including James Madison and Edmund Randolph, had studied. They had been tutored at their respective universities and were indeed influenced by the prevailing political theories. In order to understand the American Presidency, we must also understand the early American Culture and accept that our culture of the 1600s and 1700s was influenced by European, especially British, thought and political practices. We view the contributions of John Locke, the Baron de Montesquieu, and Sir William Blackstone's comments on the "Powers of the King". There was significant discussion within the colonies to retain a monarchical form of government. American thoughts on the Executive and his role are looked at from the viewpoints of John Adams and Thomas Paine in 1775 and 1776.

As the Constitutional Convention convened in Philadelphia, Pennsylvania in 1787, the delegates from the twelve states (Rhode Island did not send a delegate) were not primarily concerned with political theory as the cornerstone for their new government. Even though these delegates were primarily politicians, lawyers and landed aristocracy, well versed and well educated, political theory took a back seat to the practical experience in the formation of the new government. The Articles of Confederation were weak – but they had been intentionally framed under the principles of the formation of a union (confederacy) of states with a national government adequate to the needs of the union with sufficient powers to carry out its' responsibilities. A weak central government with the states being regarded "as distinct and independent sovereigns" was viewed after the American Revolution as best fitting that definition. Contributing to the practical experience of each delegate was their own state

constitution, and the definition and exercise of the powers of their "Chief Executive". The delegates had learned from both John Locke's "Concerning Civil Government, Second Essay" in 1690, and from Charles de Secondat, Baron de Montesquieu's "L'Esprit des Louis" (The Spirit of the Laws) in 1748. Although this writing was in French, the translated version was available in the United States prior to 1787[1].

Locke's political influences can be seen in the earlier battles for colonial sovereignty and legislative power where there was much dissension on the nature of the Executive – Legislative relationship in the early state constitutions. Locke reveals "For though in a commonwealth, the members of it are distinct persons, still in reference to one another, and as such, are governed by the laws of society, yet, in reference to the rest of mankind, they make one body[2]". Additionally he states "but because the law as that are at once, and in a short time made, have a constant and lasting force, and need a perpetual execution, …it is necessary that there should be a power always in being which should see to the execution of the laws that are made, and remain in force. And thus the legislative and executive power come often to be separated[3]". Locke viewed the Legislative Body, when in session, to be the senior of the two powers. They became subject to revocation only by the will of those who placed them in their positions. When the Legislative Body was not in session, Locke believed that the Executive should exercise its powers – only equal to and not superior to the Legislature – "a fiduciary trust…" and "is to be accountable to the legislature and ultimately to the people[4]". Locke wrote about the relations of the State with other countries and discussed federalistic power and believed it "to be managed for the Public good. But what is done in reference to foreigners...must be left in great part to the prudence of those who have this power committed to them, to be managed by the best of their skill…[5]".

Another major European influence on the delegates was made by the Baron de Montesquieu in his book "The Spirit of Laws". This dissertation praised the British system of government that was organized on the principle of the separation of powers between the coordinate branches of the government. He believed that under the Constitutional Monarch in Britain the power of government was "fairly and evenly" distributed between the House of Commons, the House of the Lords and the Monarch. "When the legislative and executive powers are united in the same person or in the same body of magistrates' there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to enact them in a tyrannical manner[6]".

It is evident from the personal writings of James Madison that he was well versed on Montesquieu. In Federalist 47, Madison makes many references to the ideas of Montesquieu. Madison interprets the above Montesquieu quote by saying it did not mean that each should not act independently or have no control over the say in the acts of the branches. One person or group that has complete control over one branch should not exercise total and free control over another branch. This would subvert the fundamental principle of a free constitution and tyranny could result[7]. This separation of powers stated by Montesquieu became the foundation and pillar upon which our Constitution was framed. The weaknesses of the Articles of Confederation provided the impetus and it was the delegates' consensus that the "separation of powers" and the creation of three branches of government was absolutely necessary for the preservation of the Union. The Articles had contained a separation of powers and it did provide for a Chief Executive. It provided for a "Committee of States" which could act for Congress when not in assembly. There were a few officers appointed by Congress to do executive work with a Foreign Secretary and a Secretary of War. The Chief Officer would be known as "The President[8]". The

delegates were not believers that an absolute maxim as applied would result in a panacea. They were realists who became willing to modify this theory without total abandonment of the principle.

The delegates did not want to duplicate the political system from which they had recently revolted and declared their independence from. They wanted the best of all worlds – a system of sharing, overseeing, checking, and balancing with no branch clearly subverting or submitting to another. Locke and Montesquieu's writings provided a framework for the delegates.

Sir William Blackstone's "Commentaries on the Laws of England" became available circa 1770. His dissertations were the reference marks on the British Constitution and on Common Law. In Chapter VI, "Of the King's Duties", Blackstone discusses the relationship between the three branches in Britain, but makes it clear that a monarch "must govern according to law; to execute judgment in mercy[9]...". The real power resided in the monarch as in Chapter VII, "Of the King's Prerogatives". Chapter VI was the most informative discussion of the powers of a monarch (Executive, President) available and the language and many of those provisions that are in Article II of our Constitution trace their source to this book[10].

American political thought on the nature and scope of an Executive was minimal. In Madison's letter of April 8, 1787 to Edmund Randolph, he wrote, "A National Executive will also be necessary. I have scarcely ventured to form my own opinion yet, either of the manner in which it ought to be constituted or the authorities with which it ought be clothed[11]". In the early days of our Republic (1787), very little was known about the nature of executive leadership in our new democratic republic to write out in any great detail what the powers and limitations of the Executive should be. Our Constitution, Article II, provides a bare bones framework in that "The Executive Power shall be vested in a President of the United States..."and will in his oath

swear to "execute the office"…and "to the best of [his] ability, protect and defend the Constitution of the United States[12]

John Adams also provided a contribution for the Executive. His "Thoughts on Government" was a refinement of an earlier letter he wrote to Richard Henry Lee on November 15, 1775. This essay provided many ideas that became incorporated in the Massachusetts State Constitution. He detailed the election for the upper and lower houses, the power of appointment of officers and other magistrates, and that the Executive would be the Commander in Chief of the Army, etc[13].

Thomas Paine's thoughts on the Executive detailed an election through a "drawing of straws" to see which colony the Executive would come from and a method of selection. More memorable is his quote "but where, say some, is the King of America?…he reigns above and does not make havoc of mankind like the royal brute of Great Britain",…"in America the law is king[14]

It is also recognized that other factors had a substantial influence on the decision before the convention and how to overcome the deficiencies of previous colonial governments. These new influences were as a result of the changing face of the world and were economical versus political influences. The emergence of a commercial society and the concept of the free market economy were factors to be considered. How would they be able to merge the principles of political thought of Locke, Montesquieu, and Blackstone, with the birth of a free market economy and commercial society, and yet maintain the true spirit of civic republicanism?

Executive Proposals at the Constitutional Convention

Article IX of the Articles of Confederation provided for "Congress assembled to appoint a committee to sit in the recess of Congress…to appoint one of their number to reside; provided

that no person be allowed to serve in the office of president more than one year in any term of three years…[15]". This was the Confederation's idea of legislative democracy, a weak central government, the means to ensure state sovereignty and supremacy, and a feeble effort at the creation of an Executive. It was almost a forgone conclusion of the delegates that at least one major alteration to the Articles of Confederation was needed, the creation of a different Executive. Under Article XI, statutes were created for the administration of foreign affairs, finances, war, and other permanent agencies to administer our national government, "establishing and regulating post offices from one state to another...[16]". This attempt to manage the administrative affairs under the direction and supervision of Congress was failing. Congressional leaders were required to make decisions in matters of details of the operation of these agencies. Many of these decisions could have been made at an administrative versus legislative level. Some congressional leaders may have exercised undue influence over the committees. Finally, there was no single coordinating "head" to whom these agencies and committees could report. Due to decentralization, there was no overall administration. A National Administrative Branch directed by a separate, full-time, responsible person, operating directly upon the people independent of state authorities, was a consensus understanding for the formation of the new government.

On May 29, 1787, Edmund Randolph provided the first working outline to consider as a new government. His proposal, "The Virginia Plan", articulated in Section Seven ": that a National Executive be instituted; to be chosen by the National Legislature for the term of ____ years…to be compensated for services…and it ought to enjoy the executive rights vested in Congress by the Confederation[17]". Very vague, but certainly a humble beginning. It appears in Madison's meticulous notes of the Convention that the scope of Executive power and authority

had many highs and lows during the debates[18]. A recording of these proposals and compromises, without also discussing the other branches, would be impossible. The main and critical issue facing the delegates regarding the Executive was a "strong versus a weak" Executive, and the co-issue of a "singular versus plural" Executive.

Battle lines were drawn. On one side were those who favored an Executive who would merely be an agent of the legislature (Sherman, Randolph and Mason, i.e.). Their Executive would be weak and composed of a group of officials acting as the legislature directed. The only powers would be those granted by Congress. The Executive would not have the powers of veto, appointments, treaty making or to declare war. Congress would retain those powers. This was the model found in most state constitutions at the time of the Convention. On Monday, June 4, 1787, in the "Committee of the Whole" Roger Sherman seemed to agree to a "singular executive" although weak and as he stated "that in all states there was a Council of Advice, without which the First Magistrate could not act[19]". Only three days earlier, Sherman considered the "Executive Magistracy as nothing more than an institution for carrying out the will of the Legislature into effect...appointed by and accountable to the Legislature only...[20]".

An opposite viewpoint also existed in the concept of a Chief Executive, vested in a single person, chosen by some other method than by the Legislature, with stronger powers vested in the office by the Constitution. This would ensure separation of powers and place beyond the whims and dictates of legislative interferences. This view was not of an extreme "monarcharistic" Executive. The Executive that delegates viewed here (James Wilson, the most prominent) was fashioned after the strong executive as in the constitutions of New York in 1777[21] and in Massachusetts in 1780[22]. A leader with strong vested constitutional powers could prevent encroachment by and a diminishment of the office by an overly zealous legislature.

When the Virginia Plan's proposal on the Executive came up for debate on June 1, 1787, James Wilson motioned that "the Executive consist of a single person[23]" and it was seconded. Charles Pickney expressed his favor for a vigorous executive, but was afraid it "would render the Executive a monarchy of the worst kind, to wit an elective one[24]". James Wilson's motion took the Convention by surprise. According to Madison's notes, " a considerable pause ensuing" and Doctor Franklin observed "it was a point of great importance and wished the gentlemen to deliver their sentiments…[25]". The delegates' reluctance to speak on the proposal and express their sentiments may have been grounded in a pre-conceived and unspoken thought. The Chairman of the Convention, George Washington, should be the first person to be the National Executive under the Constitution. Others may have believed their speaking in favor of a "strong singular" Executive would be perceived as the supporting of a monarchical type of elected Executive as Charles Pickney had just stated.

Leading the opposition of a single Executive was Edmund Randolph, sayng it was "…a foetus of monarchy…[26]". Realizing that supporting the concept of a single Executive would be like supporting an elected monarchy, James Madison suggested that the motion be deferred until the other matters (manner of election, powers, veto provisions) could be decided. On July 17, 1787, Wilson's motion of a single executive with vested powers passed on a 7 for and 3 against vote. Those voting against were Delaware, Maryland and New York. Virginia's vote was split and New Jersey lacked their quorum[27]. This was the Federal Convention's key decision on the establishment of the Executive. It laid the foundation for development of the concept of the Executive as Chief of State. By uniting all powers of the office in one person's hands, it assured that they could be exercised with dispatch and easily fixed responsibility[28]. On Monday, August 6, 1787, a printed copy of the Report of the Committee of Detail was delivered to each delegate.

Article X of that report stated "The Executive Power of the United States shall be vested in a single person" and his title shall be "His Excellency". In the final draft of the Constitution all references to "His Excellency" were dropped without explanation. The single Executive, the American Presidency, was born in that report, given 215 years ago.

Once the final draft of the Convention was made on September 17, 1787, it was to be debated in the state legislatures and, upon ratification by nine of the thirteen states, would become "The Law of the Land". Throughout those state ratification debates, there emerged two opposing camps of thought, those favoring ratification (Federalists), and those opposing ratification (Anti-Federalists). A debater was not necessarily all one or all the other. A review of the "generalist position" of each side and the most vocal of each side regarding the strong, singular Executive now follows.

In the Letter of the Federal Farmer (XIV) of January 17, 1788, he states: "independent of practice, a single man seems to be peculiarly well circumstanced to superintend the execution of the laws…the people usually appoint a first man – he is to be seen in civilized as well as uncivilized nations – in republics and other governments[29]". To the question of potential abuse of power or the establishment of a monarch, he admits "moderate and even well defined powers (in the hands of the same man)" for a few years will (not) be abused. The more common view of the Anti-Federalists was general hostility to a strong Executive. Some wanted the plural executive or the executive council, in order to avoid the dangers of a monarchy[30]. Publius and Brutus feared the standing army and its' possible use by the Executive as "Commander-In-Chief". The most vocal opposition came from Patrick Henry in his speeches before the Virginia ratification convention. His most noteworthy speech regarding the Executive was delivered on June 5, 1788. He makes reference: "there is to be a great and mighty President, with very

extensive powers; the powers of a King: He is to be supported in extravagant magnificence". Henry questions the propriety of having ambitious, unrelenting men as President and having the army in his hands. He also "expatriates on the probability of the President's enslaving America and the horrible consequences that must result. Among other deformities, it has an awful squinting; it squints toward monarchy…Your president may easily become king". If he exceeds his powers "where is the existing force to punish him"? "Away with your President, we shall have a king…What will then become of you and your rights? Will not absolute depotism ensure[31]"? In Henry's speech, June 9, 1788, he quotes Montesquieu: "when you give titles of Nobility, you know what you give; but when you give power, you know not what you give[32]".

In defense of the strong, singular Executive with vested powers, Alexander Hamilton's defended that idea in Federalist 70 (March 15, 1788). Hamilton states: "a vigorous Executive is (not) inconsistent with the genius of republican government". Even in the greatest of all republics, as in Rome, the "republic was obliged to take refuge in the absolute power of a single man[33]". The central government, under the new Constitution, ensured an intertwining of powers between the coordinate branches that could, before tyranny granted a foothold, "cut off the head of the despot (impeachment)[34]". Hamilton in his logical approach to justification of the strong, singular Executive asks what ingredients are necessary for the establishment of an "energetic executive". "The ingredients…are first unity, secondly duration, thirdly an adequate provision for its support, (and) fourthly competent powers[35]". He asks how will safety in the republican sense be ensured? By a "due dependence on the people, secondly a due responsibility[36]".

As a result of deliberations, it was decided that a single Executive acting with an energetic approach to the demands of the nation using forthright decisions, quickness of actions and secrecy, guarding the national interest, would be best suited. These are qualities found in a

single person, not a plural group of individuals; "power in a single hand[37]", states Hamilton. He further discusses the means of destroying that unity "either by vesting the power in two or more magistrates of equal dignity and authority[38]" (Two consuls of Rome) or by "vesting…to the controul and cooperation of others…[39]". He then points to the state constitutions of New York and New Jersey. History, he implies, provides no sound direction on this matter as both sides could provide examples to justify their position. The most brilliant argument in favor of his position is "But quitting the dim light of historical research and attaching ourselves purely to the dictates of reason and good sense, we…discover much greater cause to reject…the idea of plurality in the Executive…[40]". What does common sense and reason tell us about unity, whether it be the head of a household, business or the government. There is always the "danger of difference of opinion…[from which] the most bitter dissentions are apt to spring…[and] they lessen the respectability, weaken the authority and detract the plans and operations of those whom they divide[41]". His argument is grounded in reason and common sense, similar to the genius of the "means-end proposition" used by Madison in his defense of the legality of the Constitution in Federalist 40.

Hamilton makes his greatest objection to plurality stating "it tends to conceals faults and destroy responsibility[42]". "Responsibility is of two kinds, to censure and to punish…[43]". "In plurality, men can hide behind the secrecy of the council or blame their inadequacies and shortcomings on other members[44]". Mismanagement will most likely occur, but no one individual can be truly held responsible because the decision process itself may have been flawed or become complicated. Hamilton then directs his attention to the impact that a plural Executive will have on "WE THE PEOPLE" for whom this Constitution was formed. He believes that it will deprive the citizens of the two greatest securities of an elected individual, that being "firstly,

the restraints of public opinion which lose their efficacy…among a number[45]" and "secondly the opportunity of discovering with facility and clearness the misconduct of the persons they trust…[46]" for appropriate measures to be taken.

Hamilton had now discussed the ingredients of an energetic Executive and provided reasons why unity is the most important. Historical research has provided solid ground for his arguments, appealing to the dictates of reason and good sense. As a brilliant orator and politician, he makes his concluding remark in Federalist 70 by addressing all "intelligent" men in the nation. Even…"prior to the appearance of the Constitution, I rarely met with an intelligent man from any of the states, who did not admit as the result of experience that the unity of the Executive of this state was one of the best distinguishing features of our Constitution". Even though loud voices would be sounded later in other state ratification conventions, namely Massachusetts and New Hampshire, the proposal had been made and would be ratified by the states.

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[2] Locke, John, "Concerning Civil Government, Second Essay", in Goldsmith, William M., "The Growth of Presidential Power", Volume 1, Chelsea House, New York 1974, p 40.
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[4] Ibid. p 41.
[5] Ibid. p 41.
[6] Ibid. Montesquieu, p 49.
[7] The Federalist Papers Number 47.
[8] Jensen, Merrill (ed), "Articles of Confederation", University of Wisconsin Press, Madison, 1959, p 266 – 268.
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[12] Constitution of the United States of America.
[13] Howe, John R., Jr., "The Changing Political Thoughts of John Adams", Princeton University Press, Princeton, NJ, 1966, p 67 – 76.
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[16] Ibid. Jensen, p 268.
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[19] Ibid. Notes p 59.
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[21] Poore, Ben Perley, "Federal and State Constitutions, Colonial Charters and other Organic Laws of the United States", Part II, Lenox Hill, New York, 1924, p 1335 – 1336.
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[23] Ibid. Notes p 45.
[24] Ibid. Notes p 45.
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[32] Ibid. Storing, p 320.
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[36] Ibid.
[37] Ibid.
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[39] Ibid.
[40] Ibid.
[41] Ibid.
[42] Ibid.
[43] Ibid.
[44] Ibid.
[45] Ibid.
[46] Ibid.

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